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No. 2750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTIN H. A. ELVERS and FREDERICK A. E. ZIMMER,

Appellants,

vs.

W. R. GRACE & COMPANY (a corporation),

Appellee.

APPELLEE'S BRIEF.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellee.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Opening Statement.

Appellant's "Introductory" seems to us to be much out of place, as does also his arguments based upon testimony taken in the case, and neither appears to have any legitimate purpose.

As conceded in the brief,

> "The principal question *on this appeal* is the question of law whether the cesser clause of this case constitutes a defence to libelant's action" (Br. p. 3),

and to this alone are appellant's "Points and Authorities" directed (pp. 14 to 44), while the appeal itself is from a decree sustaining the exceptions to the libel. No

questions of fact were considered or passed upon by the lower court, and in appellant's brief they are only used to "point a moral and adorn a tale".

The brief contains a collection of strong adjectives, which in various forms appear again and again throughout the brief, with a view of impressing the court with the idea that the case is one of "aggravated injustice"—"a flagrant case of playing fast and loose with helpless ship-owners who were thousands of miles away, and not in a position to protect themselves", which "call(s) loudly for a remedy".

Should we at any time hereafter be called upon to discuss the evidence, we feel satisfied we can convince the court that the record does not warrant such statements, while there is much in the conduct of appellants open to serious reflection. But we do not intend to adopt appellant's methods.

The free use of such exaggerated statements seems clearly to point to a single purpose, namely, to invite the court to illustrate the old saying that "hard cases make bad law".

It is a confession of weakness.

It seems to us, also, that we might with much confidence rely for refutation of this claim of "aggravated injustice" upon the sense of justice of the judge of the lower court, whose reputation for a keen sense of justice is undisputed. He had before him *all the facts,* as well as the exceptions to the libel, and therefore had the opportunity of basing his decision *upon the facts,* as well as upon the *"technical defence",* of which appel-

lant complains, and yet he chose to lay aside the consideration of those facts which, according to appellant, contain the evidence of the alleged "aggravated injustice", and based his decision upon the legal proposition that the libel does not state a cause of action. May we not assume that his ear was also open to "a case where justice demanded more loudly redress for a commercial injury", if in fact this were such a case?

One cannot read the opinion in this case without being impressed with the mental attitude of that court. Having before him the previous order of Judge De Haven, he approached the question of law involved with hesitancy, and surely if the facts of the case then before him evidenced any injustice to the ship-owner, let alone an "aggravated case of injustice", it would have been an easy matter for him to have adopted that construction of the charter-party and rendered judgment for the libelant upon the facts, if the facts warranted such judgment.

The final decree from which appeal is taken, is in the following terms (p. 147):

> "The above cause having come on for hearing and the said cause having been tried upon its merits, the said libelants applied for leave to file an amended libel to conform to the proofs, and said application having been granted, thereupon said libelants filed an amended libel, to which the respondent excepted, upon the grounds, among others, that the said amended libel did not state facts sufficient to constitute a cause of action against this respondent; and said exceptions having been argued and submitted by the proctors for the respective parties, and due deliberation being had in the premises:

> It is now ordered, adjudged and decreed that *said exceptions be, and the same are hereby sustained,* and the said amended libel be, and the same hereby is dismissed with costs to the respondent herein.
>
> Endorsed: Filed June 3, 1915."

It is from this decree that appeal is taken (Notice of Appeal, p. 149).

This decree shows clearly that the said cause was not considered or decided by the court upon the merits, but solely and only upon the allegations of the libel, and exceptions thereto, and the final decree, from which this appeal is taken is a decree based upon questions of law raised by the said exceptions, and not based upon any of the facts submitted upon the hearing.

Why the appellant chose, in this case, to bring up the entire record, instead of simply the libel and exceptions, which are the basis of the judgment, was a mystery to us until we had the privilege of reading this "Introductory". But we now submit that that record is not before this court. It is not a part of the proceedings upon which the judgment is based, and this court is not in a position to render any decree upon the facts of the case. The respondent is entitled to the judgment of the lower court upon the facts, before this court shall undertake to *review* the case upon the facts.

We feel further justified in this position by the fact that libelant's brief does not attempt a discussion of the case upon its merits. It is true that, in their "Statement of Facts" they make some reference to the testimony, but there is no attempt at a discussion of

the case from that point of view. The reference to the testimony is only used for the purpose of illustrating their view of the construction of the charter-party, and their *"Points and Authorities" are confined to the question of construction alone.* This is further exemplified in their "Résumé of the Argument".

There are many questions involved in the case upon its merits; such, for instance, as whether or no the libelants Elvers and Zimmer are parties to the contract of charter-party; the question as to whether or no orders as to loading mill were given within forty-eight hours after arrival of the vessel at Royal Roads; the question as to whether or no the loss of time was caused by the failure of charterers to produce its stevedore; the question of whether or no the loss of time is confined to the "nine days waiting for stevedore", which the ship claims it did, or whether or no it is the fault of the master that he did not sooner procure their attendance; the question of whether or no any delay in securing the services of the stevedore after one had been named, is the ship's time or the charterer's time; the question of how much time should be allowed the charterer for loss by strikes, which are excepted in the charter-party; the question as to whether or no the master delayed the loading by refusing to receive cargo; and similar questions, none of which are disclosed in any of the argument presented on behalf of the appellants.

We will therefore confine ourselves to a consideration of the question of law raised by the pleadings, and the decision founded thereon. Should the court determine that we are in error in taking this position, and if the

consideration of questions of fact raised by the evidence brought up by this record be involved, we confidently rely upon being given an opportunity for a rehearing and a reargument upon said questions of fact, there being, as we conceive, a lack of evidence in several material respects to charge these respondents with liability, even though the cesser clause be held inapplicable.

WHAT IS THE QUESTION AT ISSUE?

Before attempting to discuss the question of law involved, it is necessary that we should have clearly in mind what the proposed subject of discussion is.

It will be noticed that a large part of the appellant's argument is based upon the contention that

> "The cesser clause does not apply to the case at bar, because *this is not a question of demurrage* either in loading or discharging. The libelant sues respondent *for wrongs done to his ship before the loading commenced*" (p. 23).

It is well to dispose of this contention at the outset, and to that end let us see what the record before the court is.

The amended libel contains a heading,

"AMENDED LIBEL FOR DEMURRAGE" (Rec. p. 21).

It alleges (Art. II, Rec. p. 122, fol. 100):

> "And it was further provided by said charter party that orders as to loading mill shall be given within 48 hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of ship at Port Angeles, Port Townsend or Royal Roads, failing which *lay*

> *days* to begin. And it was further provided by said charter party that said respondent should be allowed for the loading of said vessel, lay days as follows: Thirty (30) working lay days for loading (not to commence before the first of February, 1907, unless with charterer's consent), to commence 24 hours after the vessel is at loading place satisfactory to charterers, inward cargo and or unnecessary ballast discharged and ready to receive cargo, master having given written notice to that effect. And it was further agreed by said charter party that for each and every day's detention by the fault of respondent or agents, said respondent should pay to libelant *demurrage* at the rate of 3d sterling per registered ton per day."

A copy of the charter-party is attached, marked "Exhibit A", but does not appear to have been printed in the record in this connection. It, however, is printed in the record as "Exhibit A" to the original libel, pages 12 et seq., and the particular portion to which the above quotation refers is line 52, pages 14 and 15.

Article III, after setting forth in some detail the occurrences, concludes (p. 124):

> "That the *lay days* for the loading of the cargo of said ship, pursuant to the terms of the charter party, should have begun on the 7th day of March, 1907, and should have ended on the 12th day of April, 1907."

Article IV alleges:

> "That said respondent by its own default did not load the said ship within the 30 working lay days in said charter party agreed upon, but contrary to the terms of said charter party, said respondent delayed said ship until the 15th day of May, 1907, thereafter" (pp. 124-25).

Article V alleges:

> "That libelants by the acts and defaults of respondent as aforesaid, became entitled to demand from respondent *demurrage* for 33 days, at the rate of 3d per registered ton per day amounting to the sum of $3762.91, over and above all just deductions" (p. 125).

Article VI alleges the issuing of bills of lading,

> "But which said bills of lading contain no reference to the *demurrage* previously incurred" (p. 125).

Article VII alleges:

> "That notwithstanding respondent has been requested to pay the said sum of $3762.91, the *demurrage* aforesaid, respondent has refused, and still refuses to pay the same, or any part thereof" (pp. 125-26).

And the prayer asks the court:

> "To decree the payment of the *demurrage* aforesaid" (p. 126).

The exception to this amended libel is pointed to the fact that the libel does not state a cause of action, and upon this point it raises, as *one* of the issues, the discharge of the respondent by means of the cesser clause, which confers a lien for *demurrage.*

We respectfully ask, in view of these express allegations of the libel, how can the libelant be heard to claim

> "This is not a case of *demurrage* either in loading or discharging"?

Is he not estopped, by the express averment of his libel from setting up such a claim? This is the theory

upon which he has called us into court to defend, and is the theory upon which he has been met, as well as the theory upon which the decision of the lower court is given.

But let us consider the contention from another point of view. It is said (Br. p. 22):

> "(a) By *strict* construction the charter-party provision for 'demurrage' referred to in the cesser clause, applies only to *discharge* of the cargo.
>
> The clause gives the vessel a 'lien on cargo for demurrage' (16), and 'demurrage' is defined in the following connection:
>
> *Discharge* to be given with dispatch according to the custom of the port of destination, at such safe wharf, dock or place as charterers may direct, but at not less than 3500 ft. B. M. per day. For each and every day's detention by the default of the party of the second part or agent they agree to pay to the said party of the first part, *demurrage* at the rate of 3d sterling per registered ton per day (pp. 14-15).
>
> From such construction it would follow that it was the intent of the cesser clause to relieve the charterers only from demurrage at the port of Callao, the discharging port."

Here, again, appellant fails to state the whole case.

Immediately preceding the language above quoted by appellant from the charter-party, and as part and parcel of the same subject matter, being paragraph 52 (Rec. p. 14), we have the following:

> "Said party of the second part shall be allowed for the *loading* and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days *for loading* not to

> commence before 1st Feby. 1907, unless with charterer's consent, to commence twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo; master having given written notice to that effect."

Then, on the same line, follows:

> "*Discharge* to be given with dispatch", etc.,

as noted above, ending with the agreement to pay *demurrage* for each and every day's detention, etc.

It will scarcely do to emphasize a part of a provision with italics and to disconnect it from the rest of the provision, for the purpose of construing the contract, whether the construction is to be strict or liberal.

But that is not all.

A previous provision of the charter-party, namely, paragraph 30 (Rec. p. 13) provides:

> "Orders as to loading mill to be given within forty-eight hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend, or Royal Roads, *failing which* LAY DAYS TO COUNT."

It follows from this that the thirty working *lay days* after which *demurrage* is to be paid, *are to count,* upon a failure to give orders as to loading mill *within forty-eight hours after vessel arrives at Royal Roads.*

This seems to have been overlooked by appellant, for he says (Br. p. 24):

> "Even if 'demurrage' be extended to apply to loading, it cannot fairly be applied to the period

> *before the beginning of the lay days,* or to anything happening before noon, May 13th."

Since the lay days *are to count from the earlier period,* this argument must be deemed completely answered, on the face of the charter-party.

All this, too, in the face of the fact that the amended libel *includes both periods* in its claim for *demurrage.*

In view of the foregoing, what becomes of the argument that this is "not a case of demurrage"?

IS THE CESSER CLAUSE OPERATIVE?

What, then, is the proper construction of the charter-party in this case?

While we do not feel that much need be said in this connection beyond what is said by the District Court in its opinion, which we fully adopt, it may not be out of place for us to state the case in our own language:

Appellant's entire brief is addressed to the proposition that this court *should read the cesser clause out of the contract,* either by the expedient of pronouncing it void, or by any other expedient that will accomplish the same purpose.

The clause in question is in the following language:

> "Vessel to have a lien on cargo, for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the

> consignees, the owners and captain looking to their lien on the cargo for this purpose."

Prima facie, this clause means what it says, and if it is to be deprived of its apparent meaning and intention, it can only be done because, taking the instrument *as a whole,* and having due regard to other provisions therein contained, such a result follows from the construction of the *entire instrument.*

In what we are about to say we do not lose sight of the rule announced in *Clinck v. Radford,* and quoted by the Supreme Court in *Crossman v. Burrell,* 179 U. S. 107, in the following language:

> "In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party is, that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the ship-owner would be left unprotected in respect of that particular breach, *unless the cesser clause is expressed in terms that prohibit such a conclusion."*

As a résumé of what is said in the two English cases there referred to by the Supreme Court, the latter court said:

> "In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the ship-owner, the cesser clause is to be construed, *if possible,* as inapplicable to a liability with which the lien is not commensurate." (The italics are our own.)

We shall presently distinguish our case from the cases above cited.

Before, however, turning to that phase of the argument, we wish to call attention to certain fixed principles of law which have become axiomatic.

The court is bound so to construe an instrument as to give effect to all its terms, and not to construe it so as to render any of its provisions void.

It is not necessary to cite this court to authority for such a purpose. It has been expressed in different language by courts and text-writers, as for instance,

> "It is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effectual rather than void" (123 Cal. 143).

Again:

> "An interpretation which gives effect is preferred to one which makes void" (*Maxims of Jurisprudence,* C. C. of Cal., Sec. 3541).

Again:

> "A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties" (*Broom's Legal Maxims,* p. 410).

It is said by that author (p. 411):

> "It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, *every part of it must be made, if possible, to take effect,* and every word must be made to operate in some shape or other. The construction, likewise, must be such *as will preserve rather than destroy;* it must be reasonable, and agreeable to common understanding; it must also be favorable, and as near the minds and apparent intents of the parties as the rules of law will admit, and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts

> effectual according to the just intent of the parties; they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words."

The same idea is also often expressed by saying:

> "The court can only construe a contract, it cannot make a contract for the parties."

And this idea is perhaps best expressed in the language of the Code of Civil Procedure of the State of California, Sec. 1858, as follows:

> "The office of the judge is simply to ascertain and declare what is in terms or in substance *contained therein, not to insert what has been omitted, or to omit what has been inserted.*"

Charter-parties, like other instruments, are to be construed in this light. Indeed they are to be more favored in this respect than instruments of a more formal character.

Notwithstanding the leaning of the court to construe the cesser clause as inapplicable where the lien *by the terms of the charter-party* is not commensurate with the liability, it nevertheless has been held that where the words make it clear that such was the *intention of the parties,* the courts have held the charterers relieved, *even though the effect of such a decision was to deprive the ship-owner of his remedy (Oglesby v. Yglesias,* Ellis, Blackburn & Ellis, 930; *Milvain v. Perez,* 3 Ellis & Ellis, 495). And this rule we believe to be recognized

by all the decisions. Even in *Crossman v. Burrill* this is recognized, for the quotation from *Clink v. Bradford,* favoring a construction that will preserve the lien, contains the exception "unless the cesser clause is expressed in terms that prohibit such a conclusion".

WHAT WAS THE REAL INTENTION OF THE PARTIES.

With this introduction as to the manner of construing the contract, let us examine the cesser clause, with a view of ascertaining what the real intention of the parties was as therein expressed.

1. In the first place, a lien is given, followed with the provision:

> "It being understood that all and *any* liability of the charterers under this agreement shall cease."

In this connection it will be recalled that appellant has argued (Br. pp. 14-16) that "the language that the 'liability of the charterers shall cease and determine as soon as the cargo is on board', is ambiguous" (Br. p. 14). Note, in this connection, that he has left out of the language which he thus claims to be ambiguous, the important words *"all and any"*. Subsequently, however, on page 16, he proceeds:

> "If it be argued that the language 'all and any liability of the charterers under this agreement shall cease and determine, is broad enough to include such liability as is the subject matter of this suit, we call the attention of the court to the answer of Blackburn, J., to a similar argument in the *Christoffersen* case above cited. When counsel in that case argued that 'liability' as well before as after (the loading) cannot mean more than 'all lia-

> bility', Blackburn, J., answered: 'But on the other hand, "all liability" may mean something less'."

From the foregoing it will be seen that, while apparently he is giving consideration to the provision in this charter-party "all and any liability", he is again ignoring the word *"any"*, in which respect the language of this charter-party differs from the language which Blackburn, J., in the *Christoffersen* case said "May mean something less". Indeed, it seems to us impossible in any just view of the language used, to conceive that when the parties provided that "all and *any* liability" shall cease, they did not thereby intend to express, and in fact did express, in the broadest terms, that no liability of *any kind* should remain.

Now, read this language in connection with what follows, namely:

> *"All questions,* whether of *demurrage or otherwise,* to be settled with the consignees, *owners and captain looking to their lien on the cargo for this purpose."*

Could any language be more explicit to express the intent of the parties that the owner should look to his lien for the satisfaction of *all* claims, whether demurrage or otherwise? We respectfully submit that the terms of this cesser clause are so explicit that it cannot justly be construed "as inapplicable to the particular breach complained of", even "if by construing it otherwise the ship-owner would be left unprotected in respect of that particular breach".

In other words, that it meets in every particular the exception referred to in *Clink v. Bradford* and quoted by

the Supreme Court in *Crossman v. Burrill,* expressed in the following language:

> "That the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, *unless the cesser clause is expressed in terms that prohibit such a conclusion.*"

To our mind, this cesser clause "is expressed in terms that prohibit such a conclusion".

It is therefore in a legal sense "impossible", without violating the plain intent and expressed purpose of the parties, to so construe this cesser clause as inapplicable to the particular breach here complained of.

2. Many suggestions are made by appellant under the heading *"Principles of Construction of the Cesser Clause",* which it might not be out of place to consider in this connection. It is said that

> "The ship-owner could know nothing of the consignees at Callao", etc.

and that

> "He would be under practically insuperable difficulty in proving his case against unknown persons in Callao in respect of delay occasioned to his ship while in Puget Sound, and would be obliged to sue them in a foreign court where his lien might be of no substantial value" (Br. p. 15).

These considerations beg the entire question.

It is immaterial whether or no the ship-owner knows anything of the consignees at Callao. It is the cargo that is his security. While, in the terms of the cesser clause they are to settle with the consignees, in so doing

they are to *"look to their lien on the cargo for this purpose"*. That is their security.

It is interesting to note, that in another part of his brief, and for another purpose, appellant recognizes this fact, for he argues that the words,

> "The owners and captain looking to their lien on the cargo for this purpose",

is a

> "pointing out to the ship-owner that he is taking small chance, as his claim against the consignees is *secured* by the lien on the cargo" (Br. p. 40). (The italics are his own.)

Again, appellant says:

> "The purpose of the clause is to inform the ship-owner that, after a certain stage in the transaction, he must settle certain claims pending with another party than the charterer, viz., with the consignee, *who may be unknown to him;* that *he is losing nothing* by such an arrangement, *as he can look to the security of his lien on the cargo"* (Br. p. 41).

This, he says, is "the natural construction of the words" (Br. p. 40).

What then becomes of his objection that "the ship-owner could know nothing of the consignees at Callao"?

So, also, it is immaterial whether or no there would be difficulty in proving his case. There might be, and in fact has been, difficulty in his proving his case in the jurisdiction which he has sought, and more than all else, it is immaterial that they "would be obliged to sue in a *foreign court"*. In this connection, it is interesting to note that appellant makes repeated reference

to the fact that this *German* ship-owner would be obliged to sue in a *"foreign court"*. Was not the port of loading a "foreign court" for him? Is not this a "foreign court" to him, which is neither the port of loading nor the port of discharge? And if it be said that this is a domestic court for the respondent, is Callao not also a domestic court for the respondent, since it is repeatedly suggested in appellant's brief that "respondent has a branch house in the distant port of discharge and therefore being more at home there than at the port of loading"? (Br. p. 13).

Moreover, so far as the contract is concerned is this not a "foreign court"? It is neither the port of loading nor of discharge, both of which are outside of American jurisdiction.

a loading port", we have simply to refer to the opening portion of this reply, which shows conclusively that, so far as this court is concerned, this is a case of liability for demurrage.

4. The next proposition urged by appellant is, that if the cesser clause protects respondent from liability, for its breach of contract, "the innocent ship-owners are left without any remedy for their loss" (Br. p 17). Or, as stated on the following page:

> "We shall show that the 'lien on cargo for demurrage' in this case, is not commensurate with the liability on which the suit is based, and that, consequently, the cesser clause is inapplicable to this case" (Br. p. 18).

We do not see anything following this to the point, except the statement:

> "In the case at bar respondent required the German master and ship-owner to settle at Callao a dispute which can certainly be better settled in an American court. It may also be conclusively presumed that a lien to be enforced by a German master in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile."

We have already adverted to this claim, but the meat of this suggestion lies in the claim that "it may also be *conclusively presumed* that a lien to be enforced by a German master in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile". Why would it be so "conclusively presumed"? Is it not, as a matter of fact, presumed to the contrary? Is it not a presumption that a Peruvian or any other foreign court will do justice? And is it not also presumed that the law of a foreign jurisdiction is the same as the law of this forum? And does it not also appear by appellant's own statement that the American firm is also domiciled at Callao?

5. The next proposition urged is that the clause

"Is intended to apply only to cases where charterers and consignees are distinct persons, but such an agreement obviously was not intended to have, nor does it have, any application to a case like the one at bar, where there is no distinct consignee, but where charterer and consignee are the same person" (Br. p. 19).

In support of this contention, the clause of the charter-party is referred to, that " 'all questions whether of demurrage or otherwise', are 'to be settled with the consignees', the liability of the charterers having ceased" (p. 19).

It is hard for us to appreciate the logic of this suggestion. It must be conceded that the charter-party and the bill of lading are two distinct contracts.

In the present case the suit for recovery is based upon the contract of charter-party, not upon the contract of bill of lading, and it would seem to us to be immaterial, so far as this question is concerned, whether the consignees and the charterer be, or be not, the same person. It may be that appellant might have had two different causes of action against the same person arising each upon a separate contract, but a liability under one contract does not affect the question of liability under the other.

Nor is this all.

In this connection appellant again ignores the material provision of the contract contained in the sentence upon which he relies. The provision is not that "all questions, whether of demurrage or otherwise, are to be settled with the consignee", but it is "All questions whether of demurrage or otherwise to be settled with the consignees, *the owners and captain looking to their lien on the cargo for this purpose*".

Hence, whether the respondent be consignee, or be not consignee, the remedy is by enforcement of the lien.

6. The next proposition is based upon the idea that

> "Respondent was not a local agent for a foreign principal in loading the ship, but had assumed the responsibilities attending the discharge of the cargo at Callao" (Br. p. 21).

While it is said

> "The purpose of the cesser clause is to protect a charterer who, in making the charter-party, acted as local agent for a foreign principal, and who, after he has placed the cargo on board, wishes to wash his hands of the whole transaction and to relegate the ship-owners to the principals for whom he shipped the cargo" (Br. p. 20).

He cites *Crossman v. Burrill* to the effect that such is "the 'presumed purpose' of the cesser clause". We cannot understand how this fact, if it be a fact, can control the explicit terms of the agreement. It is immaterial what the "presumed purpose" may be. But as a matter of fact the responsibility of "attending the discharge at Callao of the cargo, which is said to have been assumed by respondent, is not such responsibility at all. Under the charter-party the vessel is consigned to charterer's agents at port of discharge "for transacting vessel's inward business". This does not place upon the charterers the responsibility for the discharge of the cargo, which rests with the master, but has simply to do with the financial transactions, such as paying the bills, and disbursing the vessel.

How the cutting off of the personal liability of respondent "as soon as the cargo is on board" can be said to be "in effect" "an ouster of jurisdiction, and as such against public policy" we are again at a loss

to understand. The page of *Carver* referred to makes no such suggestion.

7. What is further said, on pages 24 and 25 of said brief, is to the effect that the cesser clause has no force as applied to charter's liabilities accruing at the time when the ship was uncertain as to whether she would ever receive a cargo, for the charterer has no right to substitute for his liability a lien upon a future, prospective and merely contingent cargo, which, as far as the ship-owner's position on March 4th was concerned, may never be loaded", etc.

The answer to this is contained in the terms of the cesser clause itself, for it is therein provided that

> "All and any liability of the charterers under this agreement shall cease and determine *as soon as the cargo is on board.*"

There is no claim here that *if a cargo had never been placed on board* the personal liability of the charterers would have ceased for this antecedent liability. But it is in the same position as the liability of the charterer for delay during the process of loading itself. None of that antecedent liability does, or is, by the very provisions of the charter-party to cease *until the cargo is on board,* but when the cargo is once on board, all antecedent liability, whether preceding the process of loading, or during the process of loading, ceases.

8. The next suggestion under this heading is that the cesser clause is ineffective,

> "because there is *no consideration for the cesser agreement*".

The case cited in support of this proposition is not in point. In the first place, the contract there under consideration contained no cesser clause whatsoever, but it was attempted to draw by *implication* an agreement for cesser of liability from the following provision of the bill of lading:

> "The Cargo: Consignees or assignee shall pay demurrage * * * which freight and demurrage shall constitute a lien upon the cargo."

The court said:

> "Such a construction is quite inadmissible in the face of the express provision of the charter party that 'demurrage shall be paid'," etc.

It is true the court added the suggestion that "giving a lien for freight and demurrage adds nothing, because that lien exists by the maritime law of this country without any stipulation". But that is very far from saying that if there had been an express provision for the cesser of liability in a contract for which a lien had been given, that there is no consideration for the cesser of liability.

In fact, if that were the rule, there would be no need for the decision of the Supreme Court in *Crossman v. Burrill* that

> "In a charter party which contains a clause for cesser of liability of the charterers coupled with a clause creating a lien in favor of the ship-owner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate",

because, whether commensurate, or not commensurate, if it is not sufficient consideration for the cesser of lia-

bility, the fact that the cesser of liability was "coupled with a clause creating a lien in favor of the ship-owner", would be immaterial. Indeed there would be no such thing at all as a cesser clause to be discussed in American courts.

The argument also leaves out of sight the other provisions of the charter-party. The *agreement to pay charter hire* is a consideration for each and every clause in the charter-party in favor of the charterer, and there is no decision in the books which holds that the cesser clause requires a special and independent consideration to support it. The only thing upon which the courts insist is, that the lien which is given shall be commensurate with the liability waived.

Crossman v. Burrill a mistake.—We might go even further than this, and adopting the suggestion of appellant that

> "In the United States 'it is well settled that a vessel owner has a maritime lien on a cargo of the person responsible for the detention, enforceable in admiralty, regardless of the existence or non-existence of an express contract for a lien",

we come naturally to the logical conclusion that the rule laid down in *Crossman v. Burrill* is a mistake in this country. It is expressly founded upon the English rule, as laid down in *Clink v. Radford,* but since, as said by appellant,

> "In England the legal force of the lien granted to the shipowner depends solely upon the agreement of the charterer",

while in the United States the lien is given by law, irrespective of the agreement of the parties (and which proposition we think to be correct), then the *reason* of the rule upon which the Supreme Court relied for its decision in *Crossman v. Burrill fails in this country,* and the agreement for a cesser of liability is valid and enforceable *irrespective* of what the *contract* may provide with respect to the lien. Were this a case of first impression, we would most confidently urge this consideration upon the court, and contend that the English construction of the cesser clause is not applicable in this country.

9. The next proposition urged by appellant is, that the cesser clause in suit leaves it within the power of the charterer to make the agreed lien valueless by the subsequent act of the charterer.

This is based upon the idea that it is in the power of the charterer to cause a bill of lading to be issued which would not carry with it the provision for a lien contained in the charter-party, and he says that

> "as a matter of fact that is precisely what happened in this case".

He then refers to the record to prove that the master protested against signing the bills of lading, without being permitted to *insert in the bill of lading* reference to demurrage previously incurred.

This is *not* what occurred, even if we are to look to the evidence referred to by the appellant. The captain did *not* protest against signing bills of lading because no reference to damages previously incurred was per-

mitted by the charterer to be inserted in the bill of lading, neither does it appear that the charterer prevented any such reference in the bills of lading. What does appear is, that the master protested because he had a claim for demurrage *"which you have declined to pay me or to settle with me about"*. In the language of the protest he "protested against signing bills of lading as he *had not been paid demurrage"*.

Again, it is said "charterers were telegraphed to by captain to the effect that he would only sign bills of lading under protest, until his claim for demurrage was paid, or acknowledged in writing, it having been refused".

Note, that this "acknowledgment in writing" makes no reference to endorsement on the bills of lading, but was simply and only a desire to have a separate written document acknowledging liability for demurrage.

Again:

> "I claim damage amounting to $2984.72 which you have declined to pay me or to settle with me about * * * Herewith is a copy of protest which I have made before a notary for the reason that you have prevented my signing bills of lading *under protest"* (Br. pp. 28, 29, 30).

On the other hand, if we refer to the libel, which we still regard as the only record before the court, we have no such statement of fact. On the contrary, the libel sets forth, in article VI, page 125, that

> "the master of such ship, on demand of the charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter party as aforesaid by duly made protest,

> issued bills of lading to said charterers, to wit, respondent, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which said bills of lading contained no record of the demurrage previously incurred".

There is no suggestion in the libel that the master was *prevented* by the charterer, or by any one else, from preserving the rights of the owner by inserting in the bill of lading the reference to demurrage previously incurred. He states precisely what the record shows did occur, viz., that the master, on demand of the charterers, *issued a bill of lading;* that the bill of lading contained no reference to demurrage, but that the master reserved his rights on account of such breach by duly made protest. That was all that he attempted to do, that is all he thought of doing and that is all that is discussed in that connection.

The conclusion, therefore, of counsel, that the master

> "had attempted to preserve the rights of the owners *in the bills of lading* but was prevented by the charterers from doing so",

is not an accurate statement of the condition, as appears from his own record.

This matter of the preservation of the lien in the bill of lading has been fully considered by the lower court in its opinion, and we think therein satisfactorily disposed of (Rec. p. 145). However, we take the liberty of enlarging upon it as a question of law, and incidentally in this respect to distinguish the case at bar from that of *Crossman v. Burrill.*

The charter-party in the *Crossman* case was different in a material respect from this charter-party, and the facts before the court were likewise different.

In the *Crossman* case, the charter-party required "the bill of lading to be signed *as presented,* without prejudice to this charter". (Italics are our own.)

In the present case, the only provision in the charter-party which controls the bill of lading, is the provision that the *bills of lading* are "to be signed for pieces" with the clause

> " 'all on board to be delivered' and at any rate of freight shippers may desire without prejudice to this charter; but if at a lower rate than provided in charter, difference to be paid in cash at port of loading, less commission, interest and insurance".

The material difference between these two provisions of the charter-party lies in the fact that in the *Crossman* case *by the terms of the charter-party* the master *had no discretion* with respect to whether or no the bill of lading should be expressed in such terms as would import into it the lien clause of the charter-party; he was to sign bills of lading "as presented"; while in the present case the *charter-party did not deprive* the master of his right to demand a bill of lading of the character above indicated; the only restrictions upon this bill of lading being that he shall "sign for pieces" and fixing the rate of freight which the consignee was to pay, by reason of the attendant provision in no way affected the rights of the ship-owner.

Unlike the *Crossman* case, in the present case it is immaterial what the bill of lading contained, or did not

contain, because it was within the power of the master, so far as the provisions of the charter-party are concerned, to have made the proper references in his bill of lading to the demurrage clause in the charter-party, and any act of his, in this respect, whether it be a waiver or an oversight, does not alter the contract of charter-party, which alone is the instrument to be construed.

Upon this subject, the only facts before the court are the allegations of the amended libel (Art. VI, p. 4):

> "That on or about the 15th day of May, 1907, *the master of the said ship,* on the demand of the charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter-party, as aforesaid, by duly made protest, *issued bills of lading* to said charterers, to wit, respondent, wherein or whereby said respondent, or assigns, were mentioned as consignees of said cargo, *but which said bills of lading contained no reference to the demurrage previously incurred.*"

On the other hand, using the language of the Supreme Court in *Crossman v. Burrill,*

> "In the case at bar (the *Crossman* case), the provision of the charter-party which *requires* 'bills of lading to be signed *as presented, without prejudice* to this charter', while it *obliges* the master to sign bills of lading *upon request* of the charterers, does not mean that the bills of lading, or the consignees holding them, shall be subject to all the provisions of the charter, but only that the obligations of the charterers to the ship and her owners are not to be affected by the bills of lading so signed."

It was only because the bills of lading so *required by the charter-party,* and which, by the *terms of the*

charter-party the master was *obliged* to sign,, did not preserve to the ship-owner the remedy for the lien of demurrage provided in the charter-party, that the cesser clause was construed as inoperative. In and through the entire consideration of the case, it is apparent that it is the construction of the charter-party alone that is determinative of the right, the bill of lading itself being only the result of the requirements of the former instrument.

> "The master signs 'not exactly as agent of the charterer, but because he is bound to sign by reason of the charter-party'."
>
> *Carver,* Sec. 156.

> "The provision that the master shall sign bills of lading is not a mere authority to him to do so, it is an agreement that he shall do so, for breach of which the owner is liable to an action by the charterer."
>
> *Carver,* Sec. 156.

> "The common clause that the master shall 'sign bills of lading as required by the charterer, without prejudice to the charter-party', gives an express authority from the owner which appears to be, but is not unlimited. The provision that the charter-party is not to be prejudiced is rather a condition of the contract with the charterer than a limitation of the master's authority. *It means that, notwithstanding any engagements made by the bills of lading, the contract between the parties to the charter is to stand unaltered."*
>
> *Carver,* Sec. 161.

These quotations indicate more clearly than the language of the Supreme Court both propositions contained in our quotation from that court, viz: (a) under

that provision of the charter in the *Crossman* case, the master is *bound* to sign *as presented,* and (b) "without prejudice" does not relieve him of that obligation, but only preserves the charter-party unaffected thereby.

On the other hand, in a case where the provision in the charter-party concerning the signing of bills of lading is the *same as in the case at bar,* the English Court of Appeals held that the master might have required such a reference in the bills of lading to the charter as would have preserved the lien for the chartered freight, and this was approved by the House of Lords.

We quote the following from *Carver,* 5th Ed., beginning at the bottom of page 227:

> "On the other hand, in the later case of *Blankelow v. Canton Insurance Office,* (1889), 2 Q. B. 178, where the charter required the master 'to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading', it was held by the Court of Appeals that the master might have required such a reference in the bills of lading to the charter as would have preserved the lien for the chartered freight. The ship was chartered for a voyage for a lump sum. The bills of lading reserved freights on the goods shipped exceeding in the aggregate that lump sum. But on the voyage part of the goods were lost, and the bill of lading freights were therefore not enough to satisfy the chartered freight. In an action against insurers of the chartered freight, it was held that the loss, if any, was *due to the master's omission to preserve the lien for that freight* against the goods which arrived. 'In my *opinion there is nothing in the charter-party which would have prevented this being done,*

> the clause as to signing bills of lading having reference only to the question at what rates of freight the bills of lading were to be given, and the clause has nothing to do with the form in which the bills of lading were to be taken * * * except as to the rate of freight the form was in the power of the plaintiffs.' And this view seems to have been approved in the House of Lords upon appeal."

We think this makes the distinction clear, and shows that the case of *Crossman v. Burrill,* upon which the libelants have heretofore relied, is not applicable to the facts of the present case.

How can it be that "the master's omission to preserve the lien" in his bill of lading, when "there is nothing in the charter-party which would have prevented this being done", can affect the construction of the latter instrument? So far as the *charter-party is concerned,* the lien is commensurate with the liability, and it was the master's act alone that deprived his owners of that lien.

It is well settled that the master has no power to alter the contract of charter-party, and if he has no power to alter it by an act of *commission,* he certainly has no power to alter it by an act of *omission.*

10. It is further claimed that the lien is ineffective because under the charter-party the charterer had the right to take or order, the cargo out of the possession of the shipowner at Callao before receiving either freight or demurrage.

The basis of this contention rests upon the provision of the charter-party that freight is payable "on the right and *full* delivery of cargo at final port of

discharge", with emphasis on the "full", and appeal is made to the language of this court in *Dewar v. Mowinckel,* where it was said:

> "The lien for damages, like the lien for freight, is lost when the cargo is delivered to the consignee.
>
> "The lien of the ship-owner for freight being but a right to retain the goods until the payment of freight, it is inseparably associated with the possession of the goods, and is lost by an unconditional delivery to the consignee."

And appellant says:

> "On this ground the court held that the cesser clause was not operative *under the facts of that case.*"

But by consulting that decision it will at once be seen that the "facts of that case" do not fit the facts of this case. The basis of that decision was the fact

> "that the master requested of Evans that the discharge be made in such a way as to protect his lien, but his request was not complied with. The master testified that he was required to discharge into a general coal pile * * * In any view of the evidence, the cargo passed out of the possession of the master, and went into the possession of a third party, the Western Fuel Company" (179 Fed. 362).

Immediately following this statement of facts by the court is the language quoted in appellant's brief.

In the present case there is no question of the manner of the discharge of the cargo. *Non constat* but that the ship-owner would have been permitted to make a

conditional delivery such as under the law would preserve his lien.

Moreover, the "full delivery" upon which so much stress is laid, only means complete discharge *"within reach of vessel's tackle"*. By the express terms of the charter-party,

> "Cargo shall be * * * delivered within reach of vessel's tackle" (Rec. p. 15).

We understand it to be a cardinal principle that the meaning of a decision of the court must be ascertained from the particular facts to which a legal principle is applied, and that different facts make different cases.

It will be also noted that under this same heading (Br. p. 33), the appellant states that

> "W. R. Grace & Company were also the consignees of the cargo under the bill of lading",

for which he refers to the allegation of his libel, which was *not* the fact in the *Mowinckel* case. Yet one of the reasons the cesser clause was there held not applicable, was because the bill of lading "was in the hands of a stranger to the charter-party", 179 Fed. 363. Surely, the rule can not be a "double-ender" working both ways.

We think the foregoing considerations are sufficient to answer the claim made under this heading.

However, it appears to us further that in the case at bar the lien for demurrage is entirely disassociated

from the lien for freight. It is a separate and distinct agreement, and we are not concerned with whether or no a lien for freight can be preserved under the charter-party so long as the lien for demurrage can be preserved. There is no provision in the charter-party for delivery of the cargo before payment of demurrage, and there is nothing in the facts or terms of the charter-party that would prevent the master from holding the cargo until his demurrage is settled while postponing the settlement of his claim for freight to a later period.

11. The next allegation is that the lien is ineffective because respondent, as consignee of the ship, had control of discharge at Callao and the power to make the enforcement of the lien not only difficult, but impossible.

Under this head appellant says:

> "The word 'consignee' signifies that the vessel, upon her arrival at Callao, was to be delivered into the *care and control of respondent* the charterer" (Br. p. 36).

In support of this claim, he cites two cases, neither one of which has the remotest application either to the subject-matter or to the principle here under consideration.

Upon this premise is based the conclusion that

> "if in such a case the master had refused to deliver the cargo to the consignee, who satisfied *respondent* of his right to receive it, respondent's agent, as general representative of the ship and ship owner, *could have ordered the master to de-*

> *liver it* and could have prevented him from enforcing his lien".

This is the ground of the contention that the lien is made ineffective and yet the very next sentence in the brief shows its futility, viz.:

> "Even if it be admitted that respondent at Callao *would have had no legal right to give such an order to the master,* the fact still remains that under such conditions and with such a provision in the charter party, it could have been made very difficult, and practically impossible for the master to retain the cargo for the protection of his lien, had he otherwise such a right" (pp. 36 and 37).

Under this admission the proposition scarcely needs attention. Appellant practically concedes that no *legal right* to do such a thing is conferred upon the charterer or consignee of the vessel, and we hardly think the court can concern itself with such a remote possibility of difficulty so long as it be conceded that the legal right remains. It will be presumed that the legal right will be enforced. There is no human transaction in which some difficulties can not be conjured up, but commercial instruments must be reasonably enforced or all commerce is at an end.

But it is a gratuitous suggestion that the consignee, because he is consignee of the vessel, could or would have made it difficult or practically impossible for the master to retain his lien. It only illustrates how very far afield the appellant is compelled to go in the hope of finding some suggestion that might catch the attention of the court and move it to set aside or nullify this contract.

12. The next claim is that it is ineffectual because under the bill of lading no claim could be made against the consignees (Br. p. 37).

This suggestion is fully answered in the opinion of the court below. It is also fully treated by us on pages ante of this brief.

It is also inconsistent with the claim made by appellants that the *respondents* are both *charterers and consignees* under the bill of lading, and therefore liable as consignees, if not as charterers. Both positions can not be correct,—which one does he wish to tie to? The libel alleges that the respondent is also consignee under the charter-party (Art. VI, p. 125), to which we have already replied that that is immaterial in the case at bar, because he has not been sued on the bill of lading contract.

We have already taken the position that the charter-party and bill of lading are two separate and distinct contracts; that the charter-party fixes the question of liability on the part of the respondent with respect to demurrage; that the bill of lading, not containing any provision regarding demurrage, *in and of itself* fixes no liability upon the consignee, and hence, *independently of the provisions of the charter-party,* would fix no liability upon the respondent for demurrage.

On the other hand, if the respondent be both charterers and consignees under the bill of lading, the position would be the same as if the bill of lading also contained "an express condition providing for the payment of demurrage", and so the respondent, *if sued*

on the bill of lading contract, might possibly be liable, because, having full and complete knowledge of the terms and conditions of the charter-party, they are not prejudiced by the failure to incorporate the condition in the bill of lading. This conclusion is based upon the reason of the rule which exempts consignees from such liability, namely, that the bill of lading is, at least, a quasi negotiable instrument, by reason of which an innocent purchaser without notice is protected.

But the respondents cannot be adjudged liable in this case as consignees, even though we accept the appellant's statement of facts, both because such legal liability does not exist under the terms of the charter-party, so to be incorporated into the bill of lading, and also because this is not an action against respondent based upon his liability under the bill of lading. On such a cause of action, he has not had his day in court. It is an entirely different cause of action, based upon a different contract from that now under consideration.

The fact, however, that the respondent has not been sued under the bill of lading, will not justify the objection which the appellants here make to the construction of the charter-party. Their contention is, "no claim *could be made* against the consignees" to which our answer is, "no claim *has been made* against the consignees,"—that is, they have not been sued upon that contract.

In making the foregoing suggestions we are not overlooking the provision of the charter-party, that the demurrage is "to be settled with the consignees,

the owners and captain *looking to their lien* on the cargo *for this purpose''*. We are only, in the foregoing, giving a ''further answer'' to appellant's point. It would be sufficient for us to rely on this latter clause which substitutes the lien for the liability of both charterer *and consignee.*

13. The next proposition urged by appellant is that respondent is liable for the damages as *consignee* because it is so *expressly stated in the cesser clause* upon which respondent relies (Br. p. 38).

If this be true, it is an additional answer to the proposition last above discussed, and it is none the less an answer to said proposition notwithstanding that we do not construe that particular term of the cesser clause as appellant construes it.

We have already considered the matter therein discussed. Appellant concludes because the provision provides that ''demurrage is to be settled with the consignees'', that they thereby become responsible in personam. He, however, deliberately closes his eyes to the last portion of the sentence, viz: ''the owners and captain looking to their lien and the cargo for this purpose''.

In reply to this suggestion, appellant says that ''if the intention had been to restrict the ship owner to the remedy in rem, *as the only remedy,* it would have been easy to express such intention by clear words''. This is a supremely hypercritical suggestion. We do not know what words could more clearly express the intention.

It is next said that the effect of our construction of the language will be to strike out of the clause the words: "All questions whether of demurrage or otherwise, to be settled with the consignees," and that the presence of these words makes our construction of the words forced and unnatural. We respectfully submit that the *criticism* is "forced and unnatural"; that no one of ordinary intelligence reading this language with honest intent can come to any such conclusion as contended for by appellant.

Nor do we see anything upon the face of the instruments, nor any allegations in the libel to indicate that the words "were inserted *by respondent* in the charter-party". Prima facie both parties are equally responsible for the language of the charter-party.

14. The next suggestion is that the additional words respecting the lien

> "is only a statement of the reasonable or reasonableness of making such an agreement, pointing out to the ship owner that he is taking a small chance, as his claim against the consignee is *secured* by the lien on the cargo. No obligation is intended to be placed upon the ship owner by the added words", etc (pp. 40 and 41).

Can it be possible that appellant expects a court to adopt this view, when reading the entire sentence beginning with "vessel to have a lien on the cargo, etc.", down to and including "owners and captain looking to their lien on the cargo for this purpose"?

15. The next suggestion is that a construction confining the remedy to an action in rem will render the contract void "on the ground that such an agreement would be an attempted ouster of the court's jurisdiction", and that such a contract is "against public policy" and consequently void.

In support of this claim appellant cites *The Tampico,* 151 Fed. 689, "in which the writer was interested as proctor".

It would seem to be sufficient answer to this proposition that if it were the law as applied to cesser clauses, then no cesser clause, no matter what its terms may be, would be valid, and that the courts, in the innumerable cases wherein the cesser clause has been upheld, have all been wrong.

We have not the time, nor do we wish particularly to criticise the decision of Judge DeHaven in *The Tampico,* though we feel satisfied that it is not good law. It stands alone on the books and does not seem to have been followed in any subsequent case. It is, however, sufficient for our present purpose to point out (1) that this contract is not a contract covered by the provisions of the Harter Act; and (2) that it is *not* a provision wherein the parties agree to waive the *lien* (which was the point of that decision) but on the contrary, it is the waiver of *"all liability"* on the part of one of the contracting parties and the acceptance, in lieu thereof, of a lien upon the cargo. Surely, there is no "public policy" which prohibits one party from releasing another party from *liability* under his contract. Indeed, the cesser clause is very much like the

contract of novation, against which there is certainly no principle of public policy.

CONCLUSION.

We feel that in the foregoing we have followed the appellant with unnecessary *minutiae* into the numerous suggestions and objections that he has made, and it is not out of place for us to add that many of them are in their nature so finely drawn and hypercritical as to condemn his entire position. They are based upon the idea of a "*strict* construction of the contract", but we respectfully submit that the idea of a "strict construction" is not one of emasculation.

As we said in the beginning, the court is bound to construe the contract in a reasonable manner, with a view of effectuating the purpose and intention of the parties, and is not at liberty to add to, or omit therefrom, any provision, or even any word.

We also take the liberty of submitting that, if we be correct in what we have hereinbefore suggested regarding the error into which we think the Supreme Court fell in adopting the English rule respecting the construction of the cesser clause, while recognizing that such error does not relieve this court from the duty of following the rule until the Supreme Court shall reverse it, we do think it should still place the court upon its guard against being "curious and subtle", as Lord Hale expresses it, in endeavoring to so construe the contract as to bring it within such rule.

If we view appellant's argument from his résumé, there certainly is nothing in it to urge the court in that direction. That résumé contains the propositions:

(1) That this is not a case of demurrage.

(2) That after the cargo was on board charterers still had the power to make the lien valueless.

(3) The respondent is also consignee, and hence liable; and,

(4) The libelants had no lien on the cargo for the damage suffered by reason of matters arising before loading the cargo; and

the clause

That the owner and captain should look to their lien on the cargo for this purpose, was only intended to point out a remedy to which he could look for security.

The mere statement of the argument in the form of his résumé is sufficient for our purpose, and we respectfully submit that the decree sustaining the exception should be affirmed.

BY DEFAULT OF CHARTERERS.

We further contend that, independently of the construction to be placed upon the cesser clause in this contract, the order sustaining the exception to the libel, and hence the decree, must be affirmed, because in another respect the libel does not state a cause of action.

The second exception to said libel, is as follows (Rec. p. 128):

> "That it is not alleged in said amended libel that said alleged failure to load the vessel within the time in said charter party provided was occasioned by the fault of said respondents or their agents."

The allegation of the libel to which this exception is pointed is Article IV, page 124, which, after setting forth the performance of all conditions of said contract on the part of said libelants, proceeds:

> "yet the said respondent by its own *default* did not load said ship within the thirty working lay days in said charter-party agreed upon" etc.

The charter-party provides with respect to the payment of demurrage (Rec. p. 15),

> "for each and every day's detention by the *fault* of the party of the second part, or agents, they agree to pay the said party of the first part demurrage at the rate of" etc.

It is our contention that *"fault"* and *"default"* describe two entirely different conditions.

As already decided by this court in *McLeod v. 1600 Tons of Nitrate,* 61 Fed. 851:

> "There is in the use of the word 'default' no necessary implication of negligence. As used in such an instrument, it can mean only the non-performance of contract duty, a failure upon the part of one of the contracting parties to do that which he had contracted to do. The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unfore-

> seen interruption or prevention of the act itself of loading or discharging, *not occurring through the connivance or fault of the charterers.*''

Following this expression of opinion, this court reviews the authorities, and in that connection quotes from *Thatcher v. Gas Co.,* 2 Lowell 361, a portion of which quotation is as follows:

> ''If the respondents do not furnish the wharf room, or any other means or appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and unavoidable vis major, or something like it.''

The foregoing is sufficient to illustrate our contention in the present case.

The libel alleges that the delay was due to respondents' ''default'', in other words, to a breach of his contract obligation, irrespective of whether it occurred ''through the connivance or fault'' or ''negligence'' of the charterers, which is a much broader liability than that imposed upon them by the agreement to pay for detention caused by their fault.

But by the contract in this case, their agreement to pay demurrage is limited to ''detention by the fault'' of the charterers.

It may very well be that there is a detention by ''default'' of the charterers, which is neither the result of ''negligence'' or ''connivance'' on the part of the respondents, and therefore a claim for detention by ''de-

fault'' of charterers does not constitute a cause of action against them under this contract.

Dated, San Francisco,
November 3, 1916.

Respectfully submitted,

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IRVING H. FRANK,
Proctors for Appellee.